Komplek Kewangan Malaysia Bhd v Mukti bin Haji Mahamood & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24-507 OF 1994
LOW HOP BING J
14 MARCH 1997

Land Law *— Sale of land — Auction — Application to set aside auction — Whether plaintiff complied with mandatory requirement for sale by auction — Whether intervener was bona fide purchaser for valuable consideration — National Land Code 1965 s 257(1)(a)*

An auction pursuant to s 256 of the National Land Code 1965 ('the NLC') was held on 8 July 1996 and the property was sold to the successful bidder ('the intervener'). The intervener paid 10% of the purchase price on the same day. On 9 August 1996, the defendant filed an application to set aside the auction sale and to return the 10% deposit to the intervener, on the ground that the auction was improper, null and void. On 23 September 1996, the defendant applied to stay the issuance of Form 16F (the certificate of sale), which was granted on 14 November 1996 pending disposal of the above application. The intervener paid the balance of the purchase price on 27 September 1996.

The defendant contended that the plaintiff had failed to comply with the consequential orders made by the senior assistant registrar in that there were delays by the plaintiff in advertising the auction sale, in posting a copy of the advertisement on the notice board of the Registrar of Titles and in depositing RM2,000 for costs and the document of title with the court. The issue was whether the mandatory requirement for the sale to be by public auction had been effected by the plaintiff. The defendant also argued that the intervener was not a bona fide purchaser, on the ground that the applications to set aside the sale and to stay the issuance of Form 16F had been served on him when he paid the balance of the purchase price.

Held, dismissing the application:

(1) The mandatory requirement for the sale to be by public auction under s 257(1)(a) of the NLC had been complied with by the plaintiff. The plaintiff had also publicly advertised the conditions of sale, thus satisfying the duty under s 258(2)(a) of the NLC. However, in view of the various delays, the plaintiff had not complied with the orders made by the registrar. These delays were occasioned by the plaintiff as the chargee or the plaintiff's agent and not by the intervener as the purchaser (see p 160C–E).

(2) The intervener, as the successful bidder and purchaser, paid 10% of the purchase price on the day of the auction sale. He

A subsequently paid the balance of the purchase price within the time frame prescribed in the terms and conditions of sale. This would make the intervener a bona fide purchaser for valuable consideration (see p 161A–F).

B **[Bahasa Malaysia summary**

Suatu lelong menurut s 256 Kanun Tanah Negara 1965 ('KTN') telah diadakan pada 8 Julai 1996 dan harta tersebut telah dijual kepada pihak membida yang berjaya ('pencelah'). Pencelah telah membayar 10% daripada harga belian pada hari yang sama. Pada 9 Ogos 1996, defendan telah memfailkan suatu permohonan untuk C mengetepikan jualan lelong dan untuk mengembalikan 10% deposit kepada pencelah, atas alasan bahawa lelong adalah tidak elok, batal dan tak sah. Pada 23 September 1996, defendan memohon untuk menggantung pengeluaran Borang 16F (perakuan jualan), yang diberikan pada 14 November 1996 sementara menunggu penyelesaian D permohonan tersebut. Pencelah membayar baki harga belian pada 27 September 1996.

Defendan menghujahkan bahawa plaintif telah gagal mematuhi perintah berbangkit yang dibuat oleh penolong kanan pendaftar dalam ertikata bahawa terdapat kelewatan oleh plaintif dalam mengiklankan jualan lelong, dalam meletak sesalinan iklan pada papan notis E Pendaftar Hakmilik dan dalam mendepositkan RM2,000 untuk kos dan dokumen hakmilik dengan mahkamah. Isu adalah sama ada keperluan mandatori supaya jualan diadakan melalui lelong awam telah dilaksanakan oleh plaintif. Defendan juga menghujahkan bahawa pencelah bukanlah pembeli bona fide, atas alasan bahawa permohonan F untuk mengetepikan jualan dan untuk menggantung pengeluaran Borang 16F telah dikemukakan kepadanya apabila dia membayar baki harga belian.

Diputuskan, menolak permohonan:

G (1) Keperluan mandatori untuk jualan diadakan melalui lelong awam di bawah s 257(1)(a) KTN telah dipatuhi oleh plaintif. Plaintif juga telah mengiklankan secara awam syarat-syarat untuk jualan tersebut, justeru itu memenuhi kewajipan di bawah s 258(2)(a) KTN. Walau bagaimanapun, memandangkan pelbagai kelewatan, plaintif tidak mematuhi perintah yang dibuat oleh pendaftar. H Kelewatan-kelewatan ini telah disebabkan oleh plaintif sebagai pemegang gadaian atau ejen plaintif dan bukan oleh pencelah sebagai pembeli (lihat ms 160C–E).

(2) Pencelah, sebagai pihak membida dan pembeli yang berjaya, telah membayar 10% daripada harga belian pada hari jualan I lelong. Berikutnya dia telah membayar baki harga belian dalam jangka masa yang disyaratkan dalam terma dan syarat jualan. Ini akan menjadikan pencelah seorang pembeli bona fide untuk balasan bernilai (lihat ms 161A–F).]

Notes

For cases on auction, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2456–2469.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors [1995] 2 MLJ 770 (refd)

Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)

M & J Frozen Food Sdn Bhd v Siland Sdn Bhd [1994] 1 MLJ 294 (refd)

Morland v Hales and Somerville (1911) 30 NZLR 201 (refd)

Legislation referred to

National Land Code 1965 ss 256, 257(1)(a), 258(1)(b), (2)(a)

Zakaria Embi (*Zainal Abidin & Co*) for the plaintiff.
Mastura Ma'sud (*Arifin & Partners*) for the defendant.
Rajehgopal a/l Velu (*Rajehgopal & Silva Velu*) for the intervener.

Cur Adv Vult

Low Hop Bing J:

CHRONOLOGY OF EVENTS

An order for sale was granted on 10 January 1996 in respect of a charge action commenced pursuant to s 256 of the National Land Code 1965 ('the NLC'). Consequential orders were granted by the senior assistant registrar on 7 May 1996.

On 4 July 1996, the defendant paid RM10,000 to the plaintiff towards settlement. The plaintiff filed a last-minute application to postpone the auction on 8 July 1996. The court dismissed the said application on 8 July 1996. The property was sold to one Khor Tin Yeow at RM525,000. The purchaser paid 10% of the purchase price on the same day.

On 9 August 1996, the defendant filed an application (encl 15) to set aside the auction sale. The application was served on the plaintiff's solicitors on 16 August 1996 and on the successful purchaser on 19 August 1996.

Hearing of the application (encl 15) was first fixed for 12 September 1996 but the purchaser was absent. Hearing was adjourned to 10 December 1996.

On 23 September 1996, the defendant filed an application (encl 22) to stay the issuance of Form 16F (certificate of sale). The application was served on the plaintiff's solicitors on 27 September 1996 and served on the purchaser on 26 September 1996. Affidavit of service was filed in court on 1 October 1996.

The purchaser paid the balance of the purchase price on 27 September 1996.

Enclosure 22 was heard on 3 October 1996. The purchaser was present. The decision on encl 22 was delivered on 14 November 1996 wherein a stay on the issuance of Form 16F was granted pending disposal of encl 15 on 10 December 1996. The purchaser was present on 14 November 1996. He was granted leave to intervene in the proceeding on the same day.

DEFENDANT'S APPLICATION AND CONTENTION

By encl 15, the defendant applied to set aside the auction sale held on 8 July 1996 and the proclamation of sale issued on the same day, and thereafter to return the 10% deposit paid by the successful bidder on the said date, on the ground that the auction was improper, null and void.

In essence, it is the defendant's contention that the plaintiff had failed to comply with the court order dated 7 May 1996 ('the court order') eg in relation to the advertisement in the English newspaper which was only effected by the auctioneer as the plaintiff's agent on 26 June 1996, being 12 days before the auction, and the posting on the notice board of the Registrar of Titles, which was only effected by the auctioneer as the plaintiff's agent on 19 June 1996, being nine days before the auction and the document of title and RM2,000 was only deposited in the court by the plaintiff on 28 June 1996, being 10 days before the auction. The above non-compliance amounts to an impropriety which nullifies the auction sale conducted on 8 July 1996.

DECISION OF THE COURT

The court order dated 7 May 1996

The order for sale in this case was granted on 10 January 1996 pursuant to s 256 of the NLC, the land in question being a registry tittle. Under s 257(1)(a) of the NLC, '[e]very order for sale made by the court under s 256 shall provide for sale to be by public auction'.

Further, under s 258(1)(b) of the NLC, 'where any such order has been made it shall be the duty of the registrar of the court to see that the sale is publicly advertised in accordance with the rules of court, or in the absence of any rule in that behalf, the practice customarily adopted in the State'. This provision requires the sale to be publicly advertised in accordance with rules of court and this has been done in this case.

The consequential orders made by the registrar are in the following terms (relevant paragraph in its original language):

> Dan adalah diperintahkan bahawa perisytiharan jualan tanah tersebut dibentangkan dalam empat (4) bahasa iaitu Bahasa Malaysia, Inggeris, Cina dan Tamil dan diluluskan oleh penolong kanan pendaftar, Mahkamah Tinggi, Shah Alam disiarkan dengan menampal dan mengedar satu salinan di atas papan tanda pendaftar hakmilik, Negeri Selangor dan di suatu tempat yang nyata atas tanah tersebut empat belas (14) hari sebelum tarikh jualan dan mengiklankan satu salinan di dalam suratkhabar Bahasa Inggeris sekurang-kurangnya empat belas (14) hari mendahului jualan itu; dan adalah

diperintahkan bahawa plaintif hendaklah mendepositkan dalam mahkamah sebanyak RM2,000 terhadap perbelanjaan dan dokumen hakmilik tanah tersebut dua (2) minggu sebelum jualan tersebut.

It is not disputed by the plaintiff chargee that in view of the various delays alluded above, the plaintiff had not complied with the consequential orders made by the registrar. These delays are occasioned by the plaintiff as the chargee or the plaintiff's agent and not by the intervener as the purchaser.

The question before me is whether s 257(1)(a) of the NLC, ie the mandatory requirement for the sale to be by public auction, has been complied with by the plaintiff as the chargee. As a matter of fact, I find that the sale by auction has in fact been effected by the plaintiff and so the provision of s 257(1)(a) had been complied with by the plaintiff.

It is the plaintiff's duty under s 258(2)(a) of the NLC to 'prepare the conditions of sale in accordance with the terms of the order and any determination thereunder by the registrar of the court'. Preparing the conditions of sale as envisaged under s 258(2)(a) would include the advertisement of the conditions of sale and it is the plaintiff's duty and/or the auctioneer's to see to it that the sale is publicly advertised in accordance with the rules of court as ordered by the registrar of the court under s 258(1)(b) of the NLC. There is no dispute that there is public advertisement for carrying into effect the order for sale, save and except the delays occasioned by the plaintiff and/or the plaintiff's agent.

Is the intervener a bona fide purchaser?

Contention of the defendant

The defendant's counsel submits that the purchaser is not a bona fide purchaser.

The submission for the defendant was founded on the fact that the application to set aside the sale was already served on the purchaser on 16 August 1995, thus the purchaser was imputed with knowledge and notice of the circumstances alleged to render the sale illegal. That application contained a specific prayer to stay all proceedings relating to the sale. Hearing of that application was fixed for 12 September 1996, but the purchaser had chosen not to attend court on the said date. This led the defendant to file another application in encl 22 to stay the issuance of Form 16F. The application was served on the purchaser and this time, the purchaser appeared in court for the hearing on 3 October 1996. The purchaser had already made payment of the balance of the purchase price on 27 September 1996, being a date after both applications had been filed and served on him.

Contention of the plaintiff and the purchaser/intervener

It was submitted for the plaintiff and for the purchaser/intervener that the purchaser was indeed a bona fide purchaser for valuable consideration and hence, the submission of the defendant is devoid of merits.

A Court's view

In my judgment, the intervener is a bona fide purchaser and for valuable consideration. On 8 July 1996, the purchaser as the successful bidder at the auction sale paid RM52,500 being 10% of the purchase price and the balance was paid on 27 September 1996 within the time frame prescribed
B in the terms and conditions of sale.

In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors* [1995] 2 MLJ 770, the Court of Appeal considered the issue of a bona fide purchaser (see p 820). It was held that one is not a bona fide purchaser until one has paid all one's money under the contract for sale.

C The Court of Appeal referred to *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 and *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294. In *Doshi*, citing *Morland v Hales and Somerville* (1911) 30 NZLR 201, Gill FJ (at p 88) accepted the law to be as follows:

> It is said that the respondent cannot claim to be a purchaser for value
> D without notice because he had not paid the full purchase price. The authority relied on for this assertion is the New Zealand case of *Morland v Hales and Somerville* in which it was said that Somerville could not claim as purchaser for value without notice, as his contract had not yet been completed by payment of the purchase price and the conveyance of the legal estate. But here the legal estate was conveyed to the respondent by an instrument of
> E transfer which was duly registered. It is true that he paid only 10% of the purchase price in cash, but he executed a charge on the property to secure payment of the balance of the purchase price. It therefore cannot be said that he is not a purchaser for value.

In the light of the principles enunciated in the above cases, I conclude that
F the purchaser is a bona fide purchaser for value when he paid the balance of the purchase price on 27 September 1996. Hence, I dismiss the defendant's application in encl 15 with costs.

Application dismissed.

G Reported by David Lai

I

I